

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SERGIO ELIZARRARAS-  
SEPULVEDA,

Defendant.

No. CR06-4056-MWB

**ORDER REGARDING  
MAGISTRATE'S REPORT AND  
RECOMMENDATION  
CONCERNING DEFENDANT'S  
MOTION TO DISMISS**

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***I. INTRODUCTION AND BACKGROUND***

On June 21, 2006, a two count indictment was returned against defendant Sergio Elizarraras-Sepulveda charging him with possession of a firearm and ammunition by an illegal alien, in violation of 18 U.S.C. § 922(g)(5) (Count 1), and possession of a firearm and ammunition by an unlawful user of controlled substances, in violation of 18 U.S.C. § 922(g)(3) (Count 2). Both counts arise out of a single act of possession of the same firearm and ammunition on May 20, 2006.

On July 21, 2006, defendant Elizarraras-Sepulveda filed a Motion to Dismiss One Count of the Indictment (#11). In his motion, defendant Elizarraras-Sepulveda seeks dismissal of one of the counts of the indictment on the ground that it is multiplicitous with the other charge and therefore one of the two counts should be dismissed. Defendant Elizarraras-Sepulveda's motion was referred to United States Magistrate Judge Paul A. Zoss, pursuant to 28 U.S.C. § 636(b). On August 9, 2006, Judge Zoss filed a Report and Recommendation in which he recommends that defendant Elizarraras-Sepulveda's motion to dismiss be granted. Judge Zoss recommends that the government be ordered to elect

between the two counts of the indictment or to obtain a superseding indictment which includes both alleged violations of § 922 in a single count. Neither the government nor defendant Elizarraras-Sepulveda have filed objections to Judge Zoss's Report and Recommendation.

## ***II. LEGAL ANALYSIS***

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1).

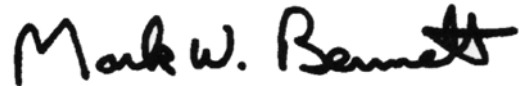
The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*).

As the court noted above, no party has filed an objection to Judge Zoss's Report and Recommendation, and it appears to the court upon review of Judge Zoss's findings and conclusions, that there is no ground to reject or modify them. Therefore, the court **accepts** Judge Zoss's Report and Recommendation of August 9, 2006, and orders that defendant Elizarraras-Sepulveda's Motion to Dismiss One Count of the Indictment is **granted**. The court orders that on or before September 15, 2006, the government shall file a notice of

dismissal as to either Count 1 or Count 2 of the indictment, or shall obtain a superseding indictment which includes both alleged violations of § 922 in a single count.

**IT IS SO ORDERED.**

**DATED** this 18th day of August, 2006.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a prominent "M" and "B".

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA